IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 560

DIXI-COLA LABORATORIES, INC., CONSTANTINE GRIVAKIS, WILLIAM H. HENNEN, ROY GOBRECHT and MARBERT PRODUCTS, INC.,
Petitioners,

vs.

THE COCA-COLA COMPANY, a Corporation,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

JOHN A. SIBLEY,
Counsel for Respondent.

HILARY W. GANS,
EDWIN CANADA,
JAMES M. SIBLEY,
Of Counsel.

The Daily Record Co., Baltimore 3, Md.

INDEX.

TABLE OF CONTENTS.

TABLE OF CASES CITED.

CONSTITUTION OF THE UNITED STATES.

ENCYCLOPEDIA CITED.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 560

DIXI-COLA LABORATORIES, INC., CONSTANTINE GRIVAKIS, WILLIAM H. HENNEN, ROY GOBRECHT and MARBERT PRODUCTS, INC.,

Petitioners,

VS.

THE COCA-COLA COMPANY, a Corporation,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

To the Honorable the Chief Justice and
the Associate Justices of the Supreme Court
of the United States:

Petitioners base their petition for certiorari upon four grounds. (Petitioners' petition in brief, pages 8, 9). Respondent believes that the grounds relied upon by the petitioners are without merit, and in substantiation of that contention submits the following brief in opposition to petitioners' petition for writ of certiorari to this Court.

ARGUMENT.

The Decision Below Violates No Constitutional Rights Of Petitioners.

At page 8 of petitioners' brief the following is found:

> "The decision below violates petitioners' rights under the Fourteenth Amendment to the Constitution of the United States . . ."*

It is well established that where a party has had a hearing in court with the full right to appear and submit its case, the judgment of the court does not violate either the Fifth or Fourteenth Amendments of the Constitution of the United States, even though the judgment is erroneous. This Court has decided the precise point on numerous occasions.**

Petitioners do not claim that they have not had the privilege of appearing and arguing their case from 1940 to date. There can be no question that any limitation has been placed upon them in the court below insofar as the right to appear and contest this case is concerned. The requisites of due process of law have therefore been fulfilled so that there is no constitutional question involved in this case.

---

* The Fourteenth Amendment restricts only the states, while the federal government is restricted by the Fifth Amendment. 16 C. J. S. Constitutional Law, §568 (b), *Nebbia* v. *New York*, 291 U. S. 502, 525; *Swank* v. *Patterson*, 139 Fed. (2) 145, 146.

** *Hagan* v. *Reclamation District No.* 108, 111 U. S. 701; *Holden* v. *Hardy*, 169 U. S. 366; *Endicott Johnson Corp.* v. *Encyclopedia Press*, 266 U. S. 285; *Dohany* v. *Rogers*, 281 U. S. 362.

There is no Conflict in the Decision below with Warner v. Lilly, 265 U. S. 526, nor with Coca-Cola Co. v. Gay-Ola Co., 211 Fed. 942, 200 Fed. 720, c. d. 229 U. S. 673, nor Turner & Seymour Mfg. Co. v. A. & J. Mfg. Co., 20 Fed. (2d) 298.

Respondent deals with petitioners' points two and three (petitioners' brief page 9) together. The argument of petitioners is based upon an erroneous inference, that is, the petitioners erroneously infer that the Court below reversed the finding of fact to the effect that the coloring matter in petitioners' drink is non-functional, and therefore rendered a decision in conflict with the decision of the court in *Warner* v. *Lilly*, supra, *Coca-Cola Co.* v. *Gay-Ola Co.*, supra, and *Turner & Seymour Mfg. Co.* v. *A. & J. Mfg. Co.*, supra. In the original hearing of the case, Judge Coleman in the District Court of Maryland made the following finding of fact which was based upon testimony and experiments in open court. The court found: (Findings of Fact Nos. 9 & 10) (OR 1549):

> "By means of caramel which is used for coloring purposes by both defendants and plaintiff and which has no real functional value defendants reproduce in their product the distinctive color of plaintiff's beverage. Defendants have also attempted to simulate the characteristic taste of plaintiff's beverage.
>
> "Plaintiff has used the same, or substantially the same, color for its product from the time that it first marketed it."

Based upon that finding of fact, the court concluded as a matter of law: (Finding of Fact No. 9) (OR 1552):

> "Plaintiff is entitled to have the defendants permanently enjoined from employing for their products the same color as that of Coca-Cola if defendants distribute, or permit their products to be distributed, or sold to the consumer other than in bottles."

These findings and conclusions were based upon the wide-spread fraud of petitioners. The District Court also found that petitioners had refilled respondents' jugs bearing petitioners trade-mark (Finding of Fact No. 12) (OR 1549) and that:

> "... defendants, through one or more of their representatives, induced and encouraged customers to sell and pass off defendants' product as and for the product of plaintiff on calls for 'Coca-Cola' and 'Coke' or 'Koke' (into which word plaintiff's trade-mark 'Coca-Cola' has been long and frequently abbreviated by the public), and defendant's product has been sold to such customers at a substantially cheaper price than that at which the product of the plaintiff is sold, with intent and as an inducement to have defendants' product passed off as and for plaintiff's product, and, as a result, said product of defendants has been so passed off extensively." (Finding of Fact No. 11) (OR 1549).

When petitioners appealed the case to the Fourth Circuit Court of Appeals, that court agreed with the finding of fact by the District Court to the effect that petitioners were guilty of fraudulent conduct.

The court stated that:

> "Fraudulent conduct on the part of the Dixi-Cola Laboratories, Inc., a Maryland corporation, and certain individuals resident in Maryland and trading as Marbert's Inc. and Apola Extract and Syrup Corporation, has been established." (OR 2159).

The court also stated:

> "The defendants are also enjoined from the performance of various acts designed to promote the passing off of their product as that of the plaintiff, and are specifically prohibited from giving to their merchandise, not sold to consumers in bottles, a color resembling the well known dark brown color of the Coca-Cola

beverage, when defendants know, or in the exercise of reasonable care should know, that the purchaser does not intend to dispense the goods to customers in bottles, or intends to use bottles with some deceiving element, enabling the goods to be passed off as the plaintiff's product." (OR 2160).

"We are, however, in accord with the conclusion of the District Court that the conduct of the defendants has been such as to justify a decree restricting their business activities in the future along certain lines. The evidence amply justifies the finding that distributors of their products in New England, New York and St. Louis, and to a less extent in Baltimore, have attempted to sell and have sold their syrup to customers, engaged in the fountain trade with the understanding that the drink made therefrom should be sold as and for Coca-Cola. The officers of the defendant corporation had knowledge of these activites and participated therein. The sale of syrup to the fountain trade constituted about ten per cent of the total business of the defendant.

"The evidence also justifies the finding that the bottled beverage made by bottlers from defendant's concentrate was passed off as Coca-Cola in various bars and taverns. It is difficult to ascertain how widespread this practice has been, but there is some evidence that an officer of the corporation encouraged the practice. The defendants were also fully aware of the use of the infringing word 'Lola Kola' by bottlers, and indeed agreed to place this word on all packages of its concentrate sold to Lola Bottlers, Inc. Under these circumstances, it is a reasonable conclusion that the defendants have conspired with their customers to palm off their goods for those of the Coca-Cola Company whenever it was safe to do so." (OR 2174).

"The defendants are also enjoined '(f) From giving to any part of their merchandise not sold by defendants, their agents or distributors, in bottles to consumers, a color imitating or resembling the color of

plaintiff's products, if or when defendants know, or in the exercise of reasonable case should know, that the purchaser thereof intends to dispense such merchandise to the consumer other than in bottles, or intends to bottle the beverage made from such product and to use on the bottles, labels or caps some extrinsic, deceiving element that in conjunction with the color imitating plaintiff's color enables such purchaser to pass off his, her or their product for plaintiff's product.'

"This portion of the decree is justified by the facts. It is true as stated in *Coca-Cola Co.* v. *Koke*, 254 U. S. 143, 147, that 'the product, including the coloring matter, is free to all who can make it if no intrinsic deceiving element is present.' See, also *Coca-Cola Co.* v. *Williamburgh Stopper Co.*, S. D. N. Y., 2 T. M. R. 234; *Coca-Cola Co.* v. *HyPo Co.*, E. D. N. Y., 1 F. Supp. 644. But it has also been held that the copying of the color of the drink may be enjoined when the act is a part of a scheme of unfair competition. *Coca-Cola Co.* v. *Gay-Ola Co.*, 6 Cir., 200 F. 720; *Coca-Cola Co.* v. *HyPo Co.*, supra." (OR 2174-2175).

Both the District Court and the Circuit Court of Appeals when faced with the wide-spread fraud of the petitioners granted a color injunction in order to vindicate the right of the respondent and to prevent future fraudulent conduct of the petitioners. It is well-established that a Court of Equity will enjoin acts, permissable in themselves, when such acts are used as a part of a scheme for defrauding another.*

Petitioners' contention concerning the conflict between the decision below and the decision in *Coca-Cola* v. *Gay-Ola*

---

* *Warner* v. *Lilly*, 265 U. S. 526; *Enock Morgan's Sons Co.* v. *Ward*, 152 Fed. 690; *Coca-Cola Company* v. *Gay-Ola Company*, 200 Fed. 720; Approved in *Warner* v. *Lilly*, supra; *Broderick & Bascom Rope Co.* v. *Manoff*, 41 Fed. (2) 353; *Champion Spark Plug Co.* v. *Champion*, 23 F. Supp. 638.

Co. must fail. Likewise, there is no conflict between the decision in the *Turner & Seymour Mfg. Co.* v. *A. & J. Mfg. Co.*, 20 Fed. (2d) 298. In that case the court approved the *Gay-Ola* case and stated:

> "But color which is non-functional and distinctive in a drink, as in *Coca-Cola Co.* v. *Gay-Ola Co.* (C. C. A.) 200 F. 720, or whisky, as in *Walker* v. *Grubman* (D. C.) 222 F. 478, may not be copied in violation of an established mark, and has been held to be in fraudulent competition."

There is no conflict with *Warner* v. *Lilly* for this Court approved the decision in the *Gay-Ola* case as follows:

> "It does not merely serve the incidental use of identifying the respondent's preparation, *Coca-Cola Co.* v. *Gay-Ola Co.*, supra, p. 724, and it is doubtful whether it should be called a non-essential."

The Court below correctly applied the Ruling of Erie R. Co. v. Tompkins, 304 U. S. 64.

Petitioners in effect contend that the Court of Appeals erred in following the line of cases which hold that the court of the forum should apply the law of the place of wrong in tort actions. Respondent submits that the position adopted by the defendants on this point can not be sustained. The Court of Appeals below followed the doctrine of *Erie R. Co.* v. *Tompkins* and stated (NR 439):

> "The defendants, without expressing an opinion on the subject, offer the speculation as to whether the law of Maryland or the law of the several states in which the acts of unfair competition took place should govern the court in deciding the liability of the defendants and the measure of damages in each instance. The case before us in its present aspect is one of unfair competition and jurisdiction rests on diversity of citizenship. The law to be applied is the law of Maryland, *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817, 72 L. Ed. 1188, 114 A. LR. 1498 including the con-

flict of law rule prevailing in the state. *Klaxon Co.* v. *Stentor Elec. Mfg. Co.*, 313 U. S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477; that is to say, we should apply the law of Maryland or the laws of the states where the wrongdoing occurred just as a Maryland court would do if the case were before it."

The court below further stated (NR 439):

"We have found no Maryland case expressly stating the Maryland Law on this point."

Petitioners do not now cite a case which sustains their contention that a Maryland Court would apply the laws of the various states to an accounting in Maryland, and in the absence of a specific ruling by the Maryland Court, the federal court is free to apply the general law.*

Petitioners principal reliance is upon a second case, *Philadelphia Dairy Products* v. *Quaker City Ice Cream Co.*, 306 Pa. 164 (defendants' brief, pages 14, 30, 31). This case is entirely without relevance to the case at bar for that court recognized the ruling adopted by the Court below. The Pennsylvania court stated:

"If there was proof showing a conspiracy between the defendant and the dealers to perpetrate a fraud upon the public to the prejudice of both the public and the plaintiff, we would have a different situation, but here proof of such a conspiracy is not complete."

In the case at bar, both the District Court and the Court of Appeals found proof of a conspiracy between the officers of petitioners and their dealers. (OR 1549; OR 2174).**

---

* *Kellogg* v. *Shredded Wheat Company*, 305 U. S. 111-113 and *Socony-Vacuum Oil Co.* v. *Rosen*, 108 Fed. (2) 632, 635.

** See also *Wilson E. Schmick* v. *West Reading Broom Works*, et al. 79 Pa. St. 331, 338; *Berkley Company* v. *Berks*, 67 U. S. P. Q. 314, 318; *Pennsylvania Central Brewing Co.* v. *Anthracite Beer Co.*, 101 Atl. 925 (Pa.).

WHEREFORE, respondent respectfully requests that petitioners' petition for certiorari be denied.

Respectfully submitted,

JOHN A. SIBLEY,
Counsel for Respondent.

HILARY W. GANS,
EDWIN CANADA,
JAMES M. SIBLEY,
Of Counsel.